

would be counted where a non-immigrant works three non-consecutive days at three different worksites (whether or not the employer owns or controls such worksite(s)), within the same area of employment. Further, for purposes of this section, the term *one-year period* shall mean the calendar year (*i.e.*, January 1 through December 31) or the employer's fiscal year, whichever the employer chooses.

(e) The employer may not make short-term placement(s) or assignment(s) of H-1B nonimmigrant(s) under this section at worksite(s) in any area of employment for which the employer has a certified LCA for the occupational classification. Further, an H-1B nonimmigrant entering the U.S. is required to be placed at a worksite in accordance with the approved petition and supporting LCA; thus, the non-immigrant's initial placement or assignment cannot be a short-term placement under this section. In addition, the employer may not continuously rotate H-1B nonimmigrants on short-term placement or assignment to an area of employment in a manner that would defeat the purpose of the short-term placement option, which is to provide the employer with flexibility in assignments to afford enough time to obtain an approved LCA for an area where it intends to have a continuing presence (*e.g.*, an employer may not rotate H-1B nonimmigrants to an area of employment for 20-day periods, with the result that nonimmigrants are continuously or virtually continuously employed in the area of employment, in order to avoid filing an LCA; such an employer would violate the short-term placement provisions).

(f) Once any H-1B nonimmigrant's short-term placement or assignment has reached the workday limit specified in paragraph (c) of this section in an area of employment, the employer shall take one of the following actions:

(1) File an LCA and obtain ETA certification, and thereafter place any H-1B nonimmigrant(s) in that occupational classification at worksite(s) in that area pursuant to the LCA (*i.e.*, the employer shall perform all actions required in connection with such LCA, including determination of the prevailing wage and notice to workers); or

(2) Immediately terminate the placement of any H-1B nonimmigrant(s) who reaches the workday limit in an area of employment. No worker may exceed the workday limit within the one-year period specified in paragraph (d) of this section, unless the employer first files an LCA for the occupational classification for the area of employment. Employers are cautioned that if any worker exceeds the workday limit within the one-year period, then the employer has violated the terms of its LCA(s) and the regulations in the subpart, and thereafter the short-term placement option cannot be used by the employer for H-1B nonimmigrants in that occupational classification in that area of employment.

(g) An employer is not required to use the short-term placement option provided by this section, but may choose to make each placement or assignment of an H-1B nonimmigrant at worksite(s) in a new area of employment pursuant to a new LCA for such area. Further, an employer which uses the short-term placement option is not required to continue to use the option. Such an employer may, at any time during the period identified in paragraphs (c) and (d) of this section, file an LCA for the new area of employment (performing all actions required in connection with such LCA); upon certification of such LCA, the employer's obligation to comply with this section concerning short-term placement shall terminate. (However, see § 655.731(c)(9)(iii)(C) regarding payment of business expenses for employee's travel on employer's business.)

[65 FR 80222, Dec. 20, 2000, as amended at 73 FR 19949, Apr. 11, 2008]

#### **§ 655.736 What are H-1B-dependent employers and willful violators?**

Two attestation obligations apply only to two types of employers: H-1B-dependent employers (as described in paragraphs (a) through (e) of this section) and employers found to have willfully violated their H-1B obligations within a certain five-year period (as described in paragraph (f) of this section). These obligations apply only to certain labor condition applications filed by such employers (as described in paragraph (g) of this section), and do not

apply to LCAs filed by such employers solely for the employment of “exempt” H-1B nonimmigrants (as described in paragraph (g) of this section and § 655.737). These obligations require that such employers not displace U.S. workers from jobs (as described in § 655.738) and that such employers recruit U.S. workers before hiring H-1B nonimmigrants (as described in § 655.739).

(a) *What constitutes an “H-1B-dependent” employer?* (1) “H-1B-dependent employer,” for purposes of THIS subpart H and subpart I of this part, means an employer that meets one of the three following standards, which are based on the ratio between the employer’s total work force employed in the U.S. (including both U.S. workers and H-1B nonimmigrants, and measured according to full-time equivalent employees) and the employer’s H-1B nonimmigrant employees (a “head count” including both full-time and part-time H-1B employees)—

(i)(A) The employer has 25 or fewer full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than seven H-1B nonimmigrants;

(ii)(A) The employer has at least 26 but not more than 50 full-time equivalent employees who are employed in the U.S.; and

(B) Employs more than 12 H-1B nonimmigrant; or

(iii)(A) The employer has at least 51 full-time equivalent employees who are employed in the U.S.; and

(B) Employs H-1B nonimmigrants in a number that is equal to at least 15 percent of the number of such full-time equivalent employees.

(2) *“Full-time equivalent employees” (FTEs)*, for purposes of paragraph (a) of this section are to be determined according to the following standards:

(i) The determination of FTEs is to include only persons employed by the employer (as defined in § 655.715), and does not include *bona fide* consultants and independent contractors. For purposes of this section, the Department will accept the employer’s designation of persons as “employees,” provided that such persons are consistently treated as “employees” for all purposes including FICA, FLSA, etc.

(ii) The determination of FTEs is to be based on the following records:

(A) To determine the number of employees, the employer’s quarterly tax statement (or similar document) is to be used (assuming there is no issue as to whether all employees are listed on the tax statement); and

(B) To determine the number of hours of work by part-time employees, for purposes of aggregating such employees to FTEs, the last payroll (or the payrolls over the previous quarter, if the last payroll is not representative) is to be used, or where hours of work records are not maintained, other available information is to be used to make a reasonable approximation of hours of work (such as a standard work schedule). (But see paragraph (a)(2)(iii)(B)(I) of this section regarding the determination of FTEs for part-time employees without a computation of the hours worked by such employees.)

(iii) *The FTEs employed by the employer* means the total of the two numbers yielded by paragraphs (a)(2)(iii)(A) and (B), which follow:

(A) The number of full-time employees. A full-time employee is one who works 40 or more hours per week, unless the employer can show that less than 40 hours per week is full-time employment in its regular course of business (however, in no event would less than 35 hours per week be considered to be full-time employment). Each full-time employee equals one FTE (e.g., 50 full-time employees would yield 50 FTEs). (Note to paragraph (a)(2)(iii)(A): An employee who commonly works more than the number of hours constituting full-time employment cannot be counted as more than one FTE.); plus

(B) The part-time employees aggregated to a number of full-time equivalents, if the employer has part-time employees. For purposes of this determination, a part-time employee is one who regularly works fewer than the number of hours per week which constitutes full-time employment (e.g., employee regularly works 20 hours, where full-time employment is 35 hours per week). The aggregation of part-

time employees to FTEs may be performed by either of the following methods (*i.e.*, paragraphs (a)(2)(iii)(B)(1) or (2)):

(1) Each employee working fewer than full-time hours counted as one-half of an FTE, with the total rounded to the next higher whole number (e.g., three employees working fewer than 35 hours per week, where full-time employment is 35 hours, would yield two FTEs (*i.e.*, 1.5 rounded to 2)); or

(2) The total number of hours worked by all part-time employees in the representative pay period, divided by the number of hours per week that constitute full-time employment, with the quotient rounded to the nearest whole number (e.g., 72 total hours of work by three part-time employees, divided by 40 (hours per week constituting full-time employment), would yield two FTEs (*i.e.*, 1.8 rounded to 2)).

(iv) *Examples of determinations of FTEs:* Employer A has 100 employees, 70 of whom are full-time (with full-time employment shown to be 44 hours of work per week) and 30 of whom are part-time (with a total of 1004 hours of work by all 30 part-time employees during the representative pay period). Utilizing the method in paragraph (a)(2)(iii)(B)(1) of this section, this employer would have 85 FTEs: 70 FTEs for full-time employees, plus 15 FTEs for part-time employees (*i.e.*, each of the 30 part-time employees counted as one-half of a full-time employee, as described in paragraph (a)(2)(iii)(B)(1) of this section). (This employer would have 23 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 1004 total hours of work by part-time employees, divided by 44 (full-time employment), yielding 22.8, rounded to 23)). Employer B has 100 employees, 80 of whom are full-time (with full-time employment shown to be 40 hours of work per week) and 20 of whom are part-time (with a total of 630 hours of work by all 30 part-time employees during the representative pay period). This employer would have 90 FTEs: 80 FTEs for full-time employees, plus 10 FTEs for part-time employees (*i.e.*, each of the 20 part-time employees counted as one-half of a full-time employee, as described in paragraph

(a)(2)(iii)(B)(1) of this section) (This employer would have 16 FTEs for part-time employees, if these FTEs were computed as described in paragraph (a)(2)(iii)(B)(2) of this section: 630 total hours of work by part-time employees, divided by 40 (full-time employment), yielding 15.7, rounded to 16)).

(b) *What constitutes an "employer" for purposes of determining H-1B-dependency status?* Any group treated as a single employer under the Internal Revenue Code (IRC) at 26 U.S.C. 414(b), (c), (m) or (o) shall be treated as a single employer for purposes of the determination of H-1B-dependency. Therefore, if an employer satisfies the requirements of the IRC and relevant regulations with respect to the following groups of employees, those employees will be treated as employees of a single employer for purposes of determining whether that employer is an H-1B-dependent employer.

(1) Pursuant to section 414(b) of the IRC and related regulations, all employees "within a controlled group of corporations" (within the meaning of section 1563(a) of the IRC, determined without regard to section 1563(a)(4) and (e)(3)(C)), will be treated as employees of a single employer. A *controlled group of corporations* is a parent-subsidiary-controlled group, a brother-sister-controlled group, or a combined group. 26 U.S.C. 1563(a), 26 CFR 1.414(b)-1(a).

(i) A *parent-subsidiary-controlled group* is one or more chains of corporations connected through stock ownership with a common parent corporation where at least 80 percent of the stock (by voting rights or value) of each subsidiary corporation is owned by one or more of the other corporations (either another subsidiary or the parent corporation), and the common parent corporation owns at least 80 percent of the stock of at least one subsidiary.

(ii) A *brother-sister-controlled group* is a group of corporations in which five or fewer persons (individuals, estates, or trusts) own 80 percent or more of the stock of the corporations and certain other ownership criteria are satisfied.

(iii) A *combined group* is a group of three or more corporations, each of which is a member of a parent-subsidiary controlled group or a brother-sister-controlled group and one of

which is a common parent corporation of a parent-subsidiary-controlled group and is also included in a brother-sister-controlled group.

(2) Pursuant to section 414(c) of the IRC and related regulations, all employees of trades or businesses (whether or not incorporated) that are under common control are treated as employees of a single employer. 26 U.S.C. 414(c), 26 CFR 1.414(c)-2.

(i) Trades or businesses are under common control if they are included in:

(A) A parent-subsidiary group of trades or businesses;

(B) A brother-sister group of trades or businesses; or

(C) A combined group of trades or businesses.

(ii) Trades or businesses include sole proprietorships, partnerships, estates, trusts or corporations.

(iii) The standards for determining whether trades or businesses are under common control are similar to standards that apply to controlled groups of corporations. However, pursuant to 26 CFR 1.414(c)-2(b)(2), ownership of at least an 80 percent interest in the profits or capital interest of a partnership or the actuarial value of a trust or estate constitutes a controlling interest in a trade or business.

(3) Pursuant to section 414(m) of the IRC and related regulations, all employees of the members of an affiliated service group are treated as employees of a single employer. 26 U.S.C. 414(m).

(i) An *affiliated service group* is, generally, a group consisting of a service organization (the “first organization”), such as a health care organization, a law firm or an accounting firm, and one or more of the following:

(A) A second service organization that is a shareholder or partner in the first organization and that regularly performs services for the first organization (or is regularly associated with the first organization in performing services for third persons); or

(B) Any other organization if:

(1) A significant portion of the second organization’s business is the performance of services for the first organization (or an organization described in paragraph (b)(3)(i) of this section or for

both) of a type historically performed in such service field by employees, and

(2) Ten percent or more of the interest in the second organization is held by persons who are highly compensated employees of the first organization (or an organization described in paragraph (b)(3)(i) of this section).

(ii) [Reserved]

(4) Section 414(o) of the IRC provides that the Department of the Treasury may issue regulations addressing other business arrangements, including employee leasing, in which a group of employees are treated as employed by the same employer. However, the Department of the Treasury has not issued any regulations under this provision. Therefore, that section of the IRC will not be taken into account in determining what groups of employees are considered employees of a single employer for purposes of H-1B dependency determinations, unless regulations are issued by the Treasury Department during the period the dependency provisions of the ACWIA are effective.

(5) The definitions of “single employer” set forth in paragraphs (b)(1) through (b)(3) of this section are established by the Internal Revenue Service (IRS) in regulations located at 26 CFR 1.414(b)-1(a), (c)-2 and (m)-5. Guidance on these definitions should be sought from those regulations or from the IRS.

(c) *Which employers are required to make determinations of H-1B-dependency status?* Every employer that intends to file an LCA regarding H-1B non-immigrants or to file H-1B petition(s) or request(s) for extension(s) of H-1B status from January 19, 2001 through September 30, 2003, and after March 7, 2005, is required to determine whether it is an H-1B-dependent employer or a willful violator which, except as provided in § 655.737, will be subject to the additional obligations for H-1B-dependent employers (see paragraph (g) of this section). No H-1B-dependent employer or willful violator may use an LCA filed before January 19, 2001, and during the period of October 1, 2003 through March 7, 2005, to support a new H-1B petition or request for an extension of status. Furthermore, on all H-1B LCAs filed from January 19, 2001 through September 30, 2003, and on or

after March 8, 2005, an employer will be required to attest whether it is an H-1B-dependent employer or willful violator. An employer that attests it is non-H-1B-dependent but does not meet the “snap shot” test set forth in paragraph (c)(2) of this section shall make and document a full calculation of its status. However, as explained in paragraphs (c)(1) and (2) of this section, which follow, most employers would not be required to make any calculations or to create any documentation as to the determination of their H-1B status.

(1) *Employers with readily apparent status concerning H-1B-dependency need not calculate that status.* For most employers, regardless of their size, H-1B-dependency status (*i.e.*, H-1B-dependent or non-H-1B-dependent) is readily apparent and would require no calculations, in that the ratio of H-1B employees to the total workforce is obvious and can easily be compared to the definition of “H-1B-dependency” (see definition set out in paragraph (a)(1) of this section).

*For example:* Employer A with 20 employees, only one of whom is an H-1B non-immigrant, would obviously not be H-1B-dependent and would not need to make calculations to confirm that status. Employer B with 45 employees, 30 of whom are H-1B non-immigrants, would obviously be H-1B-dependent and would not need to make calculations. Employer C with 500 employees, only 30 of whom are H-1B non-immigrants, would obviously not be H-1B-dependent and would not need to make calculations. Employer D with 1,000 employees, 850 of whom are H-1B non-immigrants, would obviously be H-1B-dependent and would not have to make calculations.

(2) *Employers with borderline H-1B-dependency status may use a “snap-shot” test to determine whether calculation of that status is necessary.* Where an employer’s H-1B-dependency status (*i.e.*, H-1B-dependent or non-H-1B-dependent) is not readily apparent, the employer may use one of the following tests to determine whether a full calculation of the status is needed:

(i) *Small employer* (50 or fewer employees). If the employer has 50 or fewer employees (both full-time and part-time, including H-1B nonimmigrants and U.S. workers), then the employer may compare the number of its H-1B

nonimmigrant employees (both full-time and part-time) to the numbers specified in the definition set out in paragraph (a)(1) of this section, and shall fully calculate its H-1B-dependency status (*i.e.*, calculate FTEs) where the number of its H-1B nonimmigrant employees is above the number specified in the definition. In other words, if the employer has 25 or fewer employees, and more than seven of them are H-1B nonimmigrants, then the employer shall fully calculate its status; if the employer has at least 26 but no more than 50 employees, and more than 12 of them are H-1B nonimmigrants, then the employer shall fully calculate its status.

(ii) *Large employer* (51 or more employees). If the number of H-1B nonimmigrant employees (both full-time and part-time), divided by the number of full-time employees (including H-1B nonimmigrants and U.S. workers), is 0.15 or more, then an employer which believes itself to be non-H-1B-dependent shall fully calculate its H-1B-dependency status (including the calculation of FTEs). In other words, if the number of full-time employees (including H-1B nonimmigrants and U.S. workers) multiplied by 0.15 yields a number that is equal to or less than the number of H-1B nonimmigrant employees (both full-time and part-time), then the employer shall attest that it is H-1B-dependent or shall fully calculate its H-1B dependency status (including the calculation of FTEs).

(d) *What documentation is the employer required to make or maintain, concerning its determination of H-1B-dependency status?* All employers are required to retain copies of H-1B petitions and requests for extensions of H-1B status filed with the DHS, as well as the payroll records described in § 655.731(b)(1). The nature of any additional documentation would depend upon the general characteristics of the employer’s workforce, as described in paragraphs (d)(1) through (4), which follow.

(1) *Employer with readily apparent status concerning H-1B-dependency.* If an employer’s H-1B-dependency status

(i.e., H-1B-dependent or non-H-1B-dependent) is readily apparent (as described in paragraph (c)(1) of this section), then that status must be reflected on the employer's LCA but the employer is not required to make or maintain any particular documentation. The public access file maintained in accordance with § 655.760 would show the H-1B-dependency status, by means of copy(ies) of the LCA(s). In the event of an enforcement action pursuant to subpart I of this part, the employer's readily apparent status could be verified through records to be made available to the Administrator (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(2) *Employer with borderline H-1B-dependency status.* An employer which uses a “snap-shot” test to determine whether it should undertake a calculation of its H-1B-dependency status (as described in paragraph (c)(2) of this section) is not required to make or maintain any documentation of that “snap-shot” test. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the “snap-shot” test (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(3) *Employer with H-1B-dependent status.* An employer which attests that it is H-1B-dependent—whether that status is readily apparent or is determined through calculations—is not required to make or maintain any documentation of the calculation. The employer's status must be reflected on the LCA(s), which would be available in the public access file. In the event of an enforcement action pursuant to subpart I of this part, the employer's designation of H-1B-dependent status on the LCA(s) would be conclusive and sufficient documentation of that status (except where the employer's status had altered to non-H-1B-dependent and had been appropriately documented, as described in paragraph (d)(5)(ii) of this section).

(4) *Employer with non-H-1B-dependent status who is required to perform full calculation.* An employer which attests that it is non-H-1B-dependent and does not meet the “snap shot” test set forth in paragraph (c)(2) of this section shall retain in its records a dated copy of its calculation that it is not H-1B-dependent. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(5) *Employer which changes its H-1B-dependency status due to changes in workforce.* An employer may experience a change in its H-1B-dependency status, due to changes in the ratio of H-1B nonimmigrant to U.S. workers in its workforce. Thus it is important that employers who wish to file a new LCA or a new H-1B petition or request for extension of status remain cognizant of their dependency status and do a re-check of such status if the make-up of their workforce changes sufficiently that their dependency status might possibly change. In the event of such a change of status, the following standards will apply:

(i) Change from non-H-1B-dependent to H-1B-dependent. An employer which experiences this change in its workforce is not required to make or maintain any record of its determination of the change of its H-1B-dependency status. The employer is not required to file new LCA(s) (which would accurately state its H-1B-dependent status), unless it seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section).

(ii) Change from H-1B-dependent to non-H-1B-dependent. An employer which experiences this change in its workforce is required to perform a full calculation of its status (as described in paragraph (c) of this section) and to retain a copy of such calculation in its records. If the employer seeks to hire new H-1B nonimmigrants or extend the status of existing H-1B nonimmigrants (see paragraph (g) of this section), the

employer shall either file new LCAs reflecting its non-H-1B-dependent status or use its existing certified LCAs reflecting an H-1B-dependency status, in which case it shall continue to be bound by the dependent-employer attestations on such LCAs. In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(6) *Change in corporate structure or identity of employer.* If an employer which experiences a change in its corporate structure as the result of an acquisition, merger, "spin-off," or other such action wishes to file a new LCA or a new H-1B petition or request for extension of status, the new employing entity shall redetermine its H-1B-dependency status in accordance with paragraphs (a) and (c) of this section (see paragraph (g) of this section). (See § 655.730(e), regarding change in corporate structure or identity of employer.) In the event of an enforcement action pursuant to subpart I of this part, the employer's calculations where required under paragraph (c) of this section and its records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(7) *"Single employer" under IRC test.* If an employer utilizes the IRC single-employer definition and concludes that it is non-H-1B-dependent, the employer shall perform the "snap-shot" test set forth in paragraph (c)(2) of this section, and if it fails to meet that test, shall attest that it is H-1B-dependent or shall perform the full calculation of dependency status in accordance with paragraph (a) of this section. The employer shall place a list of the entities included as a "single employer" in the public access file maintained in accordance with § 766.760. In addition, the employer shall retain in its records the "snap-shot" or full calculation of its status, as appropriate (showing the number of employees of each entity

who are included in the numerator and denominator of the equation, whether the employer utilizes the "snap shot" test or a complete calculation as described in paragraph (c) of this section). In the event of an enforcement action pursuant to subpart I of this part, the employer's records to be made available to the Administrator would enable the employer to show and the Administrator to verify the employer's determination (e.g., copies of H-1B petitions; payroll records described in § 655.731(b)(1)).

(e) *How is an employer's H-1B-dependency status to be shown on the LCA?* The employer is required to designate its status by marking the appropriate box on the Form ETA-9035 or 9035E (i.e., either H-1B-dependent or non-H-1B-dependent). An employer which marks the designation of "H-1B-dependent" may also mark the designation of its intention to seek only "exempt" H-1B nonimmigrants on the LCA (see paragraph (g) of this section, and § 655.737). In the event that an employer has filed an LCA designating its H-1B-dependency status (either H-1B-dependent or non-H-1B-dependent) and thereafter experiences a change of status, the employer cannot use that LCA to support H-1B petitions for new nonimmigrants or requests for extension of H-1B status for existing nonimmigrants. Similarly, an employer that is or becomes H-1B-dependent cannot continue to use an LCA filed before January 19, 2001 to support new H-1B petitions or requests for extension of status. In such circumstances, the employer shall file a new LCA accurately designating its status and shall use that new LCA to support new petitions or requests for extensions of status.

(f) *What constitutes a "willful violator" employer and what are its special obligations?*

(1) *"Willful violator" or "willful violator employer,"* for purposes of this subpart H and subpart I of this part means an employer that meets all of the following standards (i.e., paragraphs (f)(1)(i) through (iii))—

(i) A finding of violation by the employer (as described in paragraph (f)(1)(ii)) is entered in either of the following two types of enforcement proceeding:

(A) A Department of Labor proceeding under section 212(n)(2) of the Act (8 U.S.C. 1182(n)(2)(C) and subpart I of this part; or

(B) A Department of Justice proceeding under section 212(n)(5) of the Act (8 U.S.C. 1182(n)(5).

(ii) The agency finds that the employer has committed either a willful failure or a misrepresentation of a material fact during the five-year period preceding the filing of the LCA; and

(iii) The agency's finding is entered on or after October 21, 1998.

(2) For purposes of this paragraph, “willful failure” means a violation which is a “willful failure” as defined in § 655.805(c).

(g) *What LCAs are subject to the additional attestation obligations?* (1) An employer that is “H-1B-dependent” (under the standards described in paragraphs (a) through (e) of this section) or is a “willful violator” (under the standards described in paragraph (f) of this section) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (under the standards described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in paragraph (g)(2) of this section, to be used to support any petitions for new H-1B nonimmigrants or any requests for extensions of status for existing H-1B nonimmigrants. An LCA which does not accurately indicate the employer's H-1B-dependency status or willful violator status shall not be used to support H-1B petitions or requests for extensions. Further, an employer which falsely attests to non-H-1B-dependency status, or which experiences a change of status to H-1B-dependency but continues to use the LCA to support new H-1B petitions or requests for extension of status shall—despite the LCA designation of non-H-1B-dependency—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(2) During the period between January 19, 2001 through September 30, 2003, and on or after March 8, 2005, any em-

ployer that is “H-1B-dependent” (under the standards described in paragraphs (a) through (e) of this section) or is a “willful violator” (under the standards described in paragraph (f) of this section) shall file a new LCA accurately indicating that status in order to be able to file petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrant(s). An LCA filed during a period when the special attestation obligations for H-1B dependent employers and willful violators were not in effect (that is before January 19, 2001, and from October 1, 2003 through March 7, 2005) may not be used by an H-1B dependent employer or willful violator to support petition(s) for new H-1B nonimmigrant(s) or request(s) for extension(s) of status for existing H-1B nonimmigrants.

(3) An employer that files an LCA indicating “H-1B-dependent” and/or “willful violator” status may also indicate on the LCA that all the H-1B nonimmigrants to be employed pursuant to that LCA will be “exempt H-1B nonimmigrants” as described in § 655.737. Such an LCA is not subject to the additional LCA attestation obligations, *provided that* all H-1B nonimmigrants employed under it are, in fact, exempt. An LCA which indicates that it will be used only for exempt H-1B nonimmigrants shall not be used to support H-1B petitions or requests for extensions of status for H-1B nonimmigrants who are not, in fact, exempt. Further, an employer which attests that the LCA will be used only for exempt H-1B nonimmigrants but uses the LCA to employ non-exempt H-1B nonimmigrants (through petitions and/or extensions of status) shall—despite the LCA designation of exempt H-1B nonimmigrants—be held to its obligations to comply with the attestation requirements concerning nondisplacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively), as explicitly acknowledged and agreed on the LCA.

(4) The special provisions for H-1B-dependent employers and willful violator employers do not apply to LCAs filed from October 1, 2003 through March 7, 2005, or before January 19,



2001. However, all LCAs filed before October 1, 2003, and containing the additional attestation obligations described in this section and §§ 655.737 through 655.739, will remain in effect with regard to those obligations, for so long as any H-1B nonimmigrant(s) employed pursuant to the LCA(s) remain employed by the employer.

[65 FR 80223, Dec. 20, 2000; 66 FR 1375, Jan. 8, 2001, as amended at 66 FR 63302, Dec. 5, 2001; 70 FR 72563, Dec. 5, 2005]

**§ 655.737 What are “exempt” H-1B nonimmigrants, and how does their employment affect the additional attestation obligations of H-1B-dependent employers and willful violator employers?**

(a) An employer that is H-1B-dependent or a willful violator of the H-1B program requirements (as described in § 655.736) is subject to the attestation obligations regarding displacement of U.S. workers and recruitment of U.S. workers (as described in §§ 655.738 and 655.739, respectively) for all LCAs that are filed during the time period specified in § 655.736(g). However, these additional obligations do not apply to an LCA filed by such an employer if the LCA is used only for the employment of “exempt” H-1B nonimmigrants (through petitions and/or extensions of status) as described in this section.

(b) *What is the test or standard for determining an H-1B nonimmigrant’s “exempt” status? An H-1B nonimmigrant is “exempt” for purposes of this section if the nonimmigrant meets either of the two following criteria:*

(1) Receives wages (including cash bonuses and similar compensation) at an annual rate equal to at least \$60,000; or

(2) Has attained a master’s or higher degree (or its equivalent) in a specialty related to the intended employment.

(c) *How is the \$60,000 annual wage to be determined? The H-1B nonimmigrant can be considered to be an “exempt” worker, for purposes of this section, if the nonimmigrant actually receives hourly wages or annual salary totaling at least \$60,000 in the calendar year. The standards applicable to the employer’s satisfaction of the required wage obligation are applicable to the determination of whether the \$60,000*

wages or salary are received (see § 655.731(c)(2) and (3)). Thus, employer contributions or costs for benefits such as health insurance, life insurance, and pension plans cannot be counted toward this \$60,000. The compensation to be counted or credited for these purposes could include cash bonuses and similar payments, *provided that* such compensation is paid to the worker “cash in hand, free and clear, when due” (§ 655.731(c)(1)), meaning that the compensation has readily determinable market value, is readily convertible to cash tender, and is actually received by the employee when due (which must be within the year for which the employer seeks to count or credit the compensation toward the employee’s \$60,000 earnings to qualify for exempt status). Cash bonuses and similar compensation can be counted or credited toward the \$60,000 for “exempt” status only if payment is assured (*i.e.*, if the payment is contingent or conditional on some event such as the employer’s annual profits, the employer must guarantee payment even if the contingency is not met). The full \$60,000 annual wages or salary must be received by the employee in order for the employee to have “exempt” status. The wages or salary required for “exempt” status cannot be decreased or *pro rated* based on the employee’s part-time work schedule; an H-1B nonimmigrant working part-time, whose actual annual compensation is less than \$60,000, would not qualify as exempt on the basis of wages, even if the worker’s earnings, if projected to a full-time work schedule, would theoretically exceed \$60,000 in a year. Where an employee works for less than a full year, the employee must receive at least the appropriate *pro rata* share of the \$60,000 in order to be “exempt” (e.g., an employee who resigns after three months must be paid at least \$15,000). In the event of an investigation pursuant to subpart I of this part, the Administrator will determine whether the employee has received the required \$60,000 per year, using the employee’s anniversary date to determine the one-year period; for an employee who had worked for less than a full year (either at the beginning of employment, or after his/